Volume 111
Issue 4 *Dickinson Law Review - Volume 111, 2006-2007*

3-1-2007

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Nick Dranias*

I. Introduction

Despite accelerating technological advances, the American Bar Association (ABA) still has not accredited an online JD program or Internet law school.[1] This recalcitrance punishes people for choosing an online education and excludes marginalized populations from pursuing a legal career.[2] When enforced by state laws that restrict bar admission eligibility to graduates of ABA-accredited law schools, competent lawyers and law students are barred from practicing law for no other reason than their choice of educational medium. Thus, online legal education is necessarily devalued and diminished. Such media discrimination violates the First Amendment and creates a serious constitutional dilemma for those states that restrict bar eligibility to graduates of ABA-accredited schools.

The impact of the constitutional dilemma created by the ABA's aversion to Internet schooling is widespread. Currently, eighteen states and two U.S. territories—including such states as Florida, Iowa, Kansas, Minnesota, and New Jersey—restrict bar exam eligibility to graduates of ABA-accredited law schools.[3] Additionally, twenty-nine states and one

* Staff Attorney, Institute for Justice Minnesota Chapter. I would like to thank my wife for her crucial support in allowing me to focus on completing this Article after hours and despite a newborn and a rambunctious two year old. I would also like to thank Chip Mellor, Lee McGrath and all of my colleagues at the Institute for Justice for encouraging and enabling me to write this Article.

1. *See infra* notes 37-38 and accompanying text.

2. *See infra* note 16 and accompanying text.

3. NAT'L CONF. OF BAR EXAMINERS & ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS Chart III (2006), *available at* http://www.ncbex.org/fileadmin/mediafiles/downloads/

U.S. territory restrict admission to practice on motion (without requiring an exam) to graduates of ABA-accredited law schools.[4] Moreover, many of these restrictions are absolute, with state supreme courts expressly or implicitly refusing to recognize a waiver process for bar applicants.[5]

Although numerous lawsuits have been filed in ultimately failed efforts to strike down bar admission rules that restrict eligibility to graduates of ABA-accredited law schools,[6] none has challenged the ABA-accreditation requirement based on the First Amendment's prohibition on media discrimination.[7] This Article makes that case.[8]

Comp_Guide/2007CompGuide.pdf.

4. *Id.* at Chart VIII.

5. *See, e.g.*, *In re* Urie, 617 P.2d 505, 508 (Alaska 1980); People *ex rel.* Darley v. Carr, 43 P. 128, 129-30 (Colo. 1895); Application of Courtney, 294 A.2d 569, 573 (Conn. 1972); Florida Bd. of Bar Exam'rs *In re* Hale, 433 So.2d 969, 973 (Fla. 1983); *In re* Adams, 700 P.2d 194, 195 (N.M. 1985). Additionally, with the little-noticed repeal of the hardship waiver provision of Rule IB(6) of the State of Minnesota Rules for Admission to the Bar during 1998, it appears an ABA-accreditation restriction may now be strictly enforced without exception in Minnesota despite the state supreme court's prior history of considering waiver petitions. *Compare In re* Dolan, 445 N.W.2d 553, 558 (Minn. 1989) (waiving admission requirements to applicant with thirty-three years of experience), *with* Minn. Sup. Ct. Order No. C5-84-2139 (Aug. 18, 1998), *available at* http://www.lawlibrary.state.mn.us/archive/supct/9808/ble_rules.htm (promulgating new rules for admission to the Bar and repealing earlier Rules of the Minnesota Supreme Court and State Board of Law Examiners for admission to the Bar).

6. *See, e.g.*, Moore v. Sup. Ct. of S.C., 447 F. Supp. 527, 534 (D.S.C. 1977), *aff'd*, 577 F.2d 735 (4th Cir. 1978), *cert. denied*, 439 U.S. 984 (1978) (holding strict scrutiny was not required in evaluating an ABA-accreditation requirement because it did not involve a suspect classification or a fundamental right); Murphy v. State Bd. of Law Exam'rs, 429 F. Supp. 16, 18 (E.D. Pa. 1977) (holding that the state supreme court rule requiring bar examination applicants to have graduated from ABA-accredited law schools was not subject to strict scrutiny because the classification was not suspect, involving race, creed, or alienage, or "invidious discrimination against an insular minority"); Potter v. N.J. Sup. Ct., 403 F. Supp. 1036, 1040 (D.N.J. 1975), *aff'd*, 546 F.2d 418 (3rd Cir. 1976) (holding that adoption of standards of approving body is not the same as delegation of power pursuant to the state constitution); Florida Bd. of Bar Exam'rs, 433 So.2d at 972 (holding that the court made a rational decision to follow standards developed by the ABA); *In re* Application of Hansen, 275 N.W.2d 790, 796 (Minn. 1978), *appeal dismissed*, 441 U.S. 938 (1979) (rejecting challenge to ABA-accreditation requirements). *See generally* Robin Cheryl Miller, Annotation, *Validity, Construction, and Application of Enactment, Implementation, or Repeal of Formal Educational Requirement for Admission to the Bar*, 44 A.L.R. 4th 910 (2007).

7. *See generally* Daniel A. Klein, Annotation, *Licensing and Regulation of Attorneys, with Respect to Matters Other Than Advertisements, as Restricted by Rights of Free Speech, Expression, and Association under Federal Constitution's First Amendment—Supreme Court Cases*, 149 L. Ed. 2d 1093 (2006).

8. At the outset, it is important to emphasize that this Article discusses the ABA's law school accreditation rules in the context of a conceivable challenge against states that adopt them through bar eligibility requirements. This Article does not herald a possible legal challenge to the ABA itself, nor does it discuss possible legal theories involving constitutional or statutory claims other than those based on the First Amendment to the U.S. Constitution.

Part II of this Article explains why the Internet is at least as robust an educational medium as face-to-face communication.[9] Part III explains how the ABA's standards on accreditation—even considering the ABA's variance procedure—presumptively prohibit online JD programs and schools.[10] Part IV contends that such prejudice constitutes unconstitutional media discrimination that interferes with liberty of circulation and academic freedom.[11] Part V rebuts anticipated state action defenses to the proposed media discrimination theory.[12] Part VI discusses how a recent decision of the Ninth Circuit Court of Appeals, which applied heightened scrutiny under the First Amendment to bar admission rules, supports the theory that states cannot *absolutely* bar graduates of online JD programs from practicing law without violating the First Amendment.[13]

In short, this Article will explain why states that absolutely restrict bar eligibility to graduates of ABA-accredited schools should anticipate lawsuits charging them with a constitutionally unjustifiable prejudice against the Internet as an educational medium.

II. The Internet Is Now at Least as Robust an Educational Medium as Face-to-Face Communication

"The breakneck pace of growth in Internet-based distance learning" should not be too surprising.[14] The Internet enables twenty-four-seven educational communication that crosses hundreds and even thousands of miles—allowing students who would otherwise have no such opportunity to learn from the best professors in the nation.[15] Such accessibility taps vast reservoirs of unmet demand in marginalized populations—minorities, the poor, the disabled, the remote, and those who face

9. *See infra* notes 14-25 and accompanying text.
10. *See infra* notes 28-40 and accompanying text.
11. *See infra* notes 41-65 and accompanying text.
12. *See infra* notes 66-85 and accompanying text.
13. *See infra* notes 86-115 and accompanying text.
14. INST. FOR HIGHER EDUC. POL'Y, QUALITY ON THE LINE: BENCHMARKS FOR SUCCESS IN INTERNET-BASED DISTANCE LEARNING vii (2000), *available at* http://www.ihep.com/Pubs/PDF/Quality.pdf.
15. *Id.*, at 14 (discussing "high number of excellent faculty teaching Internet-based distance education courses"); Ulrich Boser, *Learning in Legal Limbo*, U.S. NEWS & WORLD REPORT, Oct. 20, 2003, at 60, *available at* http://www.usnews.com/usnews/edu/articles/031020/20good.b.htm (reporting that Professor Arthur Miller of Harvard Law School taught Civil Procedure at Concord Law School); Tony Mauro, *All-Online Law School Challenges Precedents*, U.S.A. TODAY, Oct. 12, 1999, at 6A, *available at* 1999 WLNR 3299963; *Mount St. Joseph Goes Online*, LEGAL ASSISTANT TODAY, Sept.-Oct. 2000, at 29-33, *available at* http://www.legalassistanttoday.com/issue_archive/00Index.htm for purchase (observing the usefulness of online learning for "armed forces all over Europe").

responsibilities that make traditional day or night school impossible.[16]

The accelerating growth rate of online schooling also reflects recognition of the increasingly robust nature of Internet information technologies at delivering educational content. Online schools have the capacity to broadcast lectures combined with live-blogging, chat rooms or bulletin boards.[17] Recently, a virtual classroom in which students could interact with each other and professors through "avatars"—graphical representations of themselves—was deployed for a lecture program at Harvard Law School.[18] In the near future, educators foresee the use of existing software that presently allows for massively multiplayer gaming in such a way that students could learn through simulated experiments and interaction with historical figures and settings

16. Kevin Deutsch, *Online Degree at Nova Helps Mom Achieve Her Goal*, MIAMI HERALD, July 13, 2003, at 1B (reporting "[b]alancing the demands of working for another degree with raising her four month old daughter was something only an online degree program could help her achieve"); Kate Schott, *Lack of Bar No Bar to Enrollment at Online Law School*, CHI. LAW., Feb. 2003, at 14; Karla Schuster, *For NSU Law School, A Virtual Innovation; Nonqualifiers Get 2nd Chance Online*, SUN-SENTINEL, Apr. 15, 2001, at 1B (observing online program expected to boost minority participation); STATEMENT OF COMMITMENT BY THE REGIONAL ACCREDITING COMMISSIONS FOR THE EVALUATION OF ELECTRONICALLY OFFERED DEGREE AND CERTIFICATE PROGRAMS i (Jan. 28, 2002), *available at* http://www.ncahlc.org/download/CRAC_Statement_DEd.pdf (observing "[t]his phenomenon is creating opportunities to serve new student clienteles and to better serve existing populations and it is encouraging innovation throughout the academy"). *Cf.* George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2094 (1998) (arguing "[b]y suppressing potential new schools that would offer cheaper, more-efficient legal education, the system has excluded many from the legal profession, particularly the poor and minorities. It has raised the cost of legal services. And it has, in effect, denied legal services to whole segments of our society"); INST. FOR HIGHER EDUC. POL'Y, *supra* note 14, at 16-17 (discussing how online coursework facilitates collaboration).

17. Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 841, 851-67 (2000) (discussing technologies used at Concord's online law school); Boser, *supra* note 15, at 60; Schott, *supra* note 16, at 14; *Weekend All Things Considered: Country's First Online Law School* (NPR radio broadcast November 24, 2002), *available at* http://www.npr.org/templates/story/story.php?storyId=854953 (reporting "within two sessions you become so familiar with the process and it goes so smoothly you feel you're in a classroom, you feel you're interacting with the other students, and you feel the teacher is interacting with you").

18. Wagner James Au, *Everything Goes Better With Daleks*, NEW WORLD NOTES, May 16, 2006, http://nwn.blogs.com/nwn/2006/05/everything_goes.html (reporting a talk at Harvard Law School hosted by public radio personality Christopher Lydon); *see generally* CARLO BONAMICO & FABIO LAVAGETTO, VIRTUAL TALKING HEADS FOR TELE-EDUCATION APPLICATIONS 8 (2001) (Digital Signal Proc. Lab, Depart. of Informatics [sic] Systems & Telecomm., U. Genova, June 15, 2001), *available at* http://www.dsp.dist.unige.it/publications/bonamico-lavagetto-ssgrr2001-final.pdf (reporting "we can imagine the creation of a 3D virtual classroom where not only the tutor is represented by an avatar, but also other students that are accessing the system at the same time . . . the virtual presence of other classmates would improve the didactic interaction between the students, and give the possibility to do more complex exercises").

in virtual reality—possibly even legal questioning from a virtual Socrates himself.[19] With advances like these, and still more in the pipeline,[20] there is little doubt the Internet is a vastly more promising educational medium than correspondence, closed-circuit television, and, perhaps, even face-to-face communication.

In fact, there is a mounting collection of academic studies that shows the educational success of modern Internet schooling equals or exceeds that of bricks and mortar schooling.[21] Moreover, the California

19. Joel Foreman, *Next-Generation: Educational Technology versus the Lecture*, EDUCAUSE REV., July-Aug. 2003, at 16, *available at* http://www.educause.edu/ir/library/pdf/erm0340.pdf.

20. U.S. DEPARTMENT OF COMMERCE, VISIONS 2020 TRANSFORMING EDUCATION AND TRAINING THROUGH ADVANCED TECHNOLOGIES 2 (2002) (discussing goal of creating "a tele-immersive environment for teaching and learning" consisting of "a three dimensional virtual space, which mimics the real space both visually, aurally and tactually . . . one in which both the student/apprentice and teacher/master can meet and interact"), *available at* http://www.technology.gov/reports/TechPolicy/2020Visions.pdf.

21. *See, e.g.*, S. Junaidu & J. AlGhamdi, *Comparative Analysis of Face-to Face and Online Course Offerings: King Fahd University of Petroleum and Minerals Experience*, INT'L J. INSTRUCTIONAL TECH. & DISTANCE LEARNING, Apr. 2004, *available at* http://www.itdl.org/Journal/Apr_04/article03.htm (comparing "face-to-face (F2F) teaching and online facilitation of a Data Structures course" and finding that the mode of educational communication had no significant impact on the quality of educational outcomes); Constance H. McLaren, *A Comparison of Student Persistence and Performance in Online and Classroom Business Statistics Experiences*, DECISION SCI. J. INNOVATIVE EDUC., Spring 2004, at 7-8 (reporting results of case study comparing traditional and online teaching of business statistics that indicated online students dropped out of class more often than traditional students but that more students participated in online courses and also that the performance of online students who remained in the class was the same as traditional students); Margaret Johnson, *Introductory Biology Online: Assessing Outcomes of Two Student Populations*, J. C. SCI. TEACHING, Feb. 2002, at 312 (reporting no significant difference between educational outcomes of online versus traditional students); John Dutton, Marilyn Dutton & Jo Perry, *Do Online Students Perform as Well as Lecture Students?*, J. ENGINEERING EDUC., Jan. 2001, at 131-36, *available at* 2001 WLNR 4449628 (reporting that "results demonstrate that online students can perform at least as well as traditional students"); M.O. Thirunarayanan & Aixa Perez-Prado, *Comparing Web-based and Classroom-based Learning: A Quantitative Study*, J. RES. COMPUTING EDUC., Winter 2001-2002, at 136 (reporting that while the online group scored slightly better that the campus group on the class posttest, the difference in performance was not statistically significant); M. Hosein Fallah & Robert Ubell, *Blind Scores in a Graduate Test: Conventional Compared with Web-based Outcomes*, ALN MAG., Dec. 2000, *available at* http://www.sloan-c.org/publications/magazine/v4n2/fallah.asp; Peter Navarro & Judy Shoemaker, *Performance and Perceptions of Distance Learners in Cyberspace*, Am. J. Distance Educ., Vol. 14 No. 2 (2000), *available at* http://web.gsm.uci.edu/~navarro/Vita05/JA%2015%20Performance%20and%20Perceptions%20of%20Distance.pdf. (reporting from a study of several hundred undergraduate macroeconomics students that "[t]he results strongly suggest that Cyberlearners can learn as well or better than Traditional Learners regardless of entering characteristics such as gender, ethnicity, academic background, computer skills, or academic aptitude and do so with a high degree of 'customer satisfaction'"); Robert LaRose, Jennifer Gregg & Matt Eastin, *Audiographic Telecourses for the Web: An Experiment Telecommunication*, J. OF COMPUTER MEDIATED

State Board of Bar Examiners has long permitted graduates of online schools to sit for its bar exam,[22] which is known as one of the most difficult exams in the country.[23] Even the ABA accredits online programs in paralegal studies and health law;[24] and it also recently allowed law schools such as Cornell to coordinate with other law schools in offering limited online courses in copyright and social security law.[25] These facts justify close scrutiny of the classification of online law schooling as just another form of highly restricted correspondence-style "distance learning" under the ABA's law school accreditation standards.

III. The ABA's Accreditation Standards Facially Discriminate Against Internet Schooling

Much has been made of the ABA's recent decision to adopt diversity standards for the accreditation of law schools at its August 2006 annual conference.[26] Less noticed were new interpretative statements suggesting that the ABA might consider variances from its accreditation standards for "experimental programs."[27] Such rhetoric may or may not

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COMM., Dec. 1998, *available at* http://jcmc.indiana.edu/vol4/issue2/larose.html (observing "the results supported the audiographic telecourse model as a potentially cost-effective approach to distributing courses over the Web"). *See generally* INST. FOR HIGHER EDUC. POL'Y, *supra* note 14, at 16-17 (discussing "high score" in interactivity for online education case studies); Adam Liptak, *Forget Socrates*, N.Y. TIMES, Apr. 25, 2004, § 4A, at 34 (reporting pass rates at the Concord online law school are the same on the California bar as bricks and mortar schools).

22. Cal. Ct. R. Reg. Admission Prac. VII, § 2(b)(4), XIX, *available at* http://calbar.ca.gov/calbar/pdfs/admissions/Rules_Regulating_Admissions52204.pdf (2006); THE STATE BAR OF CALIFORNIA, CALIFORNIA BAR EXAMINATION INFORMATION AND HISTORY 2, http://calbar.ca.gov/calbar/pdfs/admissions/Bar-Exam-Info-History.pdf (stating "[u]nlike most other states, California allows graduates from a variety of different types of law schools to take the bar examination . . . [including] distance learning and online law schools") (last visited Mar. 19, 2007).

23. James Bandler, *Raising The Bar: Even Top Lawyers Fail California Exam*, WALL ST. J., Dec. 5, 2005, at A1 (reporting California bar exam has a fifty-six percent failure rate, far higher than national average of thirty-six percent); *Highest Pass Rate Since 1965 For February's State Bar Exam*, SAN FRANCISCO CHRON., May 28, 1992, at A20 (reporting California bar exam is one of the toughest in the country).

24. Tranette Ledford, *Paralegals Go Beyond Law Offices*, DECISION TIMES, Mar. 6, 2006, at 6, *available at* http://staging.armytimes.com/story.php?f=-292313-1531405.php; Deutsch, *supra* note 16, at 1B; LEGAL ASSISTANT TODAY, *supra* note 16, at 29-33.

25. Memorandum from Peter W. Martin to John A. Sebert, ABA Consultant on Legal Education, A Report on the LII's Two Multi-Law School Courses Conducted Via the Internet in 2000-2001, Dec. 7, 2001, *available at* http://www.abanet.org/legaled/distanceeducation/lii.html.

26. Matt Krupnick, *Law Schools Must Increase Diversity*, CONTRA COSTA TIMES, Aug. 19, 2006, at A3.

27. Memorandum from John A. Sebert, Consultant on Legal Education, to Deans of ABA Approved Law Schools (Dec. 19, 2005), *available at* http://www.abanet.org/legaled/standards/commentsstandards2006/standardsmMarkup2,5,8.pdf (identifying the "two primary circumstances" justifying a variance as "the existence of extraordinary

be a step towards recognizing the reality of Internet-based education, but it is clear that the ABA's accreditation standards still facially discriminate against Internet schooling by lumping it together with less robust forms of so-called "distance learning" and restricting it even more than "study outside of the classroom."

"Distance learning," as defined by ABA Standard 306, has long been the category in which the ABA placed online JD programs and Internet schooling—alongside correspondence schooling and instruction by closed-circuit television.[28] As such, the ABA: 1) prohibits "distance learning" during the first year of law school;[29] and 2) restricts "distance learning" to no more than four hours per semester, up to a grand total of twelve hours.[30] Consequently, under normal circumstances, not even a single semester of classes can be conducted entirely online if a school desires ABA accreditation.

Significantly, the ABA's standards restrict "distance learning" to fewer credit hours than are permitted for what the ABA regards as "study outside of the classroom," such as internships and/or independent research—despite the fact that such "study" can be totally non-interactive between instructor and student (or student and student).[31] This relative favoritism for "study outside of the classroom" exists despite the fact that "ample interaction" is required between student and instructor for any form of "distance learning."[32] Such favoritism proves that the justification for the ABA's restrictions on the use of the Internet cannot be a lack of sufficient instructor-student interactivity—or even social interaction in general.[33]

In short, on their face, the ABA's accreditation standards facially

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circumstances (e.g., Hurricane Katrina) that made it impossible for a school to comply with specific standards, or a well-structured experimental program that, among other benefits, might provide useful evidence to consider in eventually making revisions of the Standards").

28. ABA SEC. OF LEGAL EDUC. AND ADMISSIONS TO B., ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 25-26, Standard 306(b) (2005-06), *available at* http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf [hereinafter ABA STANDARDS].

29. *Id.* at 26, Standard 306(e).

30. *Id.* at Standard 306(d).

31. "Study outside of the classroom" other than "distance learning" can consist of up to 13,000 instruction minutes of the required 58,000 instruction minutes. *See* ABA STANDARDS, *supra* note 28, at 21-25, Standards 304 and 305.

32. ABA STANDARDS, *supra* note 28, at 26, Standard 306(c)(1).

33. Even if Internet schooling were creatively combined with "study outside of the classroom," no more than a grand total of thirty-one credit hours could be earned in this manner (based on 700 minutes per credit hour) out of a required eighty-three credit hours. This would restrict even the most creative Internet school to providing little more than two semesters of off-site education—and, even then, only for second and third year students. *See* ABA STANDARDS, *supra* note 28, at 21-27, Standards 304, 305, and 306.

bar JD degree programs that are conducted fully or even substantially online *regardless of whether the school is otherwise able to meet the ABA's library and office infrastructure, teacher-student faculty ratios, interactivity or financial requirements.* Such discrimination against the Internet as a medium of educational communication is not overcome by the possibility of petitioning for a "variance" under ABA accreditation standard 802.[34] This is because the exercise of such authority is entirely discretionary and the failure and refusal to meet ABA standards is "prima facie" evidence justifying the denial of a variance application.[35] As there is little question that an online JD program would, at minimum, violate ABA Standards 304, 305 and 306, the ABA would have complete discretion to deny an online school's application for a variance.[36]

Not surprisingly, the ABA has repeatedly stated that it has no plans to accredit online JD programs.[37] Although that stance may be softening, the ABA has not disavowed it.[38] And while changes to Standard 802 adopted at the August 2006 ABA annual meeting suggest that the ABA might be willing to waive certain accreditation restrictions on a case-by-case basis with respect to an appropriately qualified "experimental program,"[39] even a more liberally construed variance process is still a variance process. As the ABA's accreditation standards are currently

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34. ABA STANDARDS, *supra* note 28, at 47, Standard 802. The Standard states that,

> [a] law school proposing to offer a program of legal education a portion of which is inconsistent with a Standard may apply for a variance. If the Council finds that the proposal is nevertheless consistent with the general purposes of the Standards, the Council may grant the variance and shall impose the conditions and time limits it considers appropriate.

Id.

35. Massachusetts Sch. of Law v. ABA, 1997 U.S. Dist. LEXIS 7033, at *50-51 (D. Mass. 1997) (holding "Standard 802 vests in the ABA Council the sole discretion of determining whether a proposed variance is 'consistent' with 'the purpose of the Standards'").

36. *Id.*

37. Dan Carnevale, *Bar Association Seeks to Ease Rules on Distance Education for Law Schools*, CHRON. HIGHER EDUC., July 5, 2002, at 32 (reporting the following statement by Barry A. Currier, former deputy consultant to the legal-education section of the ABA: "We're moving slowly—this [Standard 306] isn't going to authorize any law school to have a juris-doctor program through distance education. . . . It provides a lot more flexibility than schools had."); Liptak, *supra* note 21, at 34 (reporting "John A. Sebert, a bar association official, says it has no plans to accredit a completely virtual law school, though it has recently allowed traditional law schools to offer limited online courses").

38. The ABA website presently states "[c]urrently, there are not any law schools approved by the ABA that provide a J.D. degree completely via correspondence study. In fact, the ABA's general policy under Standard 304(f) states that 'a law school shall not grant credit for study by correspondence.' However, there are exceptions to the general rule." ABA SEC. OF LEGAL EDUC. AND ADMISSIONS TO B., *Standard 306: Distance Education*, http://www.abanet.org/legaled/distanceeducation/distance.html.

39. *See supra* note 27.

structured, they presumptively—and facially—discriminate against online educational communication for no other reason than it occurs online.[40]

IV. By Restricting Access to the Bar to Graduates of ABA-Accredited Schools, the State is Discriminating Against the Internet as a Medium of Educational Communication and Interfering with Liberty of Circulation and Academic Freedom

In view of the anti-online education bias of the ABA's accreditation standards, an admission rule that restricts bar eligibility to graduates of ABA-accredited law schools reduces the amount of Internet speech and association in legal education by drying up the market for online schools and JD programs. It does so by barring graduates of online law schools and JD programs from working in their chosen profession in a given jurisdiction, which destroys a substantial part of the value of a JD degree. This, in turn, creates a significant financial disincentive for would-be lawyers to participate in online JD programs. Naturally, the reduction in market demand for online JD programs diminishes the amount of Internet speech and association in legal education offered by both online and "bricks-and-mortar" schools. Given that over a third of state jurisdictions restrict bar eligibility to graduates of ABA-accredited law schools,[41] the aggregate adverse effect of these admission rules on Internet speech and association is undoubtedly substantial.

Such government-enforced prejudice against Internet legal education cannot be sustained under the First Amendment. The time when the ability to practice law was deemed a mere privilege ungoverned by constitutional considerations ended long ago.[42] When a state enacts laws that discriminate against a particular medium of communication in favor of other favored media, such laws generally run afoul of the First Amendment.[43] Moreover, the Internet is now widely

40. *Cf.* Donald J. Weidner, *Thoughts On Academic Freedom: Urofsky And Beyond*, 33 U. TOL. L. REV. 257, 263 (2001) (observing "[t]he accreditation process . . . tends to discourage the use of distance learning technologies").

41. *See supra* notes 5-6 and accompanying text.

42. Since the 1960s, the Supreme Court has repeatedly recognized a constitutionally protected liberty and property interest in pursuing a legal career and, more specifically, in sitting for the bar exam. *See, e.g.*, Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (holding state cannot deny application for bar admission without a due process hearing). And the Supreme Court has recognized the practice of law as a protected privilege under the Privileges and Immunities Clause. Barnard v. Thorstenn, 489 U.S. 546 (1989).

43. *See generally* City of Ladue v. Gilleo, 512 U.S. 43 (1994). The Court held that,

> [o]ur prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality,

recognized as an important medium, if not the "No. 1 media."[44] There is no exception from the First Amendment for laws that discriminate against the Internet.[45]

For example, in *The Pitt News v. Pappert*, the Third Circuit Court of Appeals held that a law preventing certain advertisers from running paid—but not unpaid—ads in a college newspaper was unconstitutional because "the Supreme Court recognized long ago that laws that impose special financial burdens on the media or a narrow sector of the media present a threat to the First Amendment."[46] And in *ForSaleByOwner.com v. Zinnemann*, a federal district court held the State "cannot make arbitrary distinctions based on the manner of speech or the media used for publication" and struck down an effort by California to regulate the Internet differently than the print media with respect to home sale advertisements.[47] Based on this precedent, states face claims for media discrimination when they enforce the ABA's presumption against online law schooling. Moreover, as discussed below, to successfully defend admission rules that restrict bar eligibility to graduates of ABA-accredited law schools, states need to overcome heightened scrutiny. This is because media discrimination in a university setting implicates First Amendment precedent that strongly protects liberty of circulation and academic freedom.

A. The Doctrine of Liberty of Circulation Stands Against Absolutist Admission Rules that Restrict Bar Eligibility to Graduates of ABA-Accredited Law Schools

Liberty of circulation doctrine requires courts to strictly scrutinize

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> handbills on the public streets, the door-to-door distribution of literature, and live entertainment. Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.

Id. at 55 (citations omitted); *see also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. Am. Press Co., 297 U.S. 233 (1936); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 203 (4th Cir. 1994) (holding "[w]hile the First Amendment may tolerate speech regulations that 'ban [a] particular manner or type of expression at a given time or place,' it does not accommodate regulations which ban completely a particular manner of expression") (emphasis omitted) (citations omitted).

44. Candace Lombardi, *Study: Web is the No. 1 Media*, CNET NEWS.COM, June 5, 2006, http://news.com.com/study+west+is+the+no.+1+media/2100-1024_3-6080280.html.

45. Reno v. ACLU, 521 U.S. 844, 870 (1997) (holding "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").

46. Pitt News v. Pappert, 379 F.3d 96, 102-03 (3rd Cir. 2004).

47. ForSaleByOwner.com v. Zinnemann, 347 F. Supp. 2d 868, 877 (E.D. Cal. 2004).

under the First Amendment regulations that restrict highly effective means of circulating information even if they are content-neutral and aimed at the secondary effects of the regulated conduct.[48] In *Schneider v. State*, for example, the Court struck down a licensing law for handbill distribution.[49] In doing so, the Court rejected "secondary effect" concerns about reducing the amount of litter, stating "pamphlets have proved most effective instruments in the dissemination of opinion."[50]

Although the doctrine has been most often applied in situations involving print media and prior restraints, it has also been extended to regulations that undermine free speech across modern transmission media in more subtle ways. In *Comcast Cablevision v. Broward County*, for example, the doctrine was recently invoked to strike down an ordinance that gave equal-access to a portion of a cable company's infrastructure to competing Internet service providers as a condition of the company maintaining or receiving a cable franchise.[51] This "open-access" ordinance not only overrode the editorial discretion of cable companies, it effectively subsidized competing media by allowing Internet Service Providers (ISPs) to supplement their existing infrastructure with infrastructure that would otherwise be unavailable to them.[52]

In defense of its regulatory scheme, the county government argued that the First Amendment was not implicated because the ordinance constituted economic regulation of a transmission facility that ensured

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48. *See generally* Talley v. California, 362 U.S. 60, 64-65 (1960). The Court held that,

> [t]his ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires. *There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'*

Id. (emphasis added) (citations omitted); *cf.* Linmark Assoc. v. Twp. of Willingboro, 431 U.S. 85, 93 (1977) (suggesting that content neutrality would not save law banning signage that required use of less effective media); William E. Lee, *Modernizing The Law Of Open—Air Speech: The Hughes Court And The Birth Of Content-Neutral Balancing*, 13 WM. & MARY BILL OF RTS. J. 1219, 1250-51 (2005) (discussing how content neutrality did not save ordinances from heightened scrutiny under the liberty of circulation doctrine).

49. Schneider v. State, 308 U.S. 147, 161-64 (1939) (holding "[t]o require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees").

50. *Id.*; *see also* Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

51. Comcast Cablevision v. Broward County, 124 F. Supp. 2d 685, 687-88 (S.D. Fla. 2000).

52. The related ordinance was passed "at the prompting of GTE, a telephone company offering competing services." *Id.* at 686.

more, rather than less, speech.[53] The Honorable Judge Donald M. Middlebrooks rejected this argument, observing, "[l]iberty of circulating is not confined to newspapers and periodicals, pamphlets and leaflets, but also to delivery of information by means of fiber optics, microprocessors and cable. . . . Under the First Amendment, government should not interfere with the process by which preferences for information evolve."[54] The Court also held that, for information to circulate freely as intended under the First Amendment, the marketplace of ideas must be protected from regulations that interfere "with the ability of market participants to use different cost structures and economic approaches based upon the inherent advantages and disadvantages of their respective technology."[55]

A bar admission rule that discriminates against online JD programs similarly creates significant economic incentives that favor face-to-face educational communication over online communication. Like the open-access regulation in *Comcast Cablevision*, such a rule dictates the structure of the educational market without regard to the inherent advantages or disadvantages of the respective media of communication. This interference distorts the free flow of information that would otherwise occur in the quintessential marketplace of ideas, thereby violating the doctrine of liberty of circulation as applied in *Comcast Cablevision*. And such distortion has substantive consequences for educational speech.

As paraphrased by Judge Middlebrooks in *Comcast Cablevision*, "to a substantial extent, 'the medium is the message.'"[56] Put another way, substantial regulatory interference with communication media—especially highly effective media—ossifies the content of communication by impeding the dissemination of ideas and thereby skewing the results of competition in the marketplace of ideas in favor of the established orthodoxy. Likewise, educational orthodoxy is reinforced by bar admission rules that diminish the diversity of educational voices by exclusively recognizing the ABA's "one size fits all"[57] accreditation process. From this perspective, it is not surprising that many scholars decry the uniformity of the curricular content of ABA-accredited law schools.[58] For this reason, the kind of strict scrutiny usually reserved for

53. *Id.* at 691.

54. *Id.* at 696-97.

55. *Id.* at 693.

56. *Id.* at 692 (citing MARSHALL MCLUAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN (McGraw-Hill 1964)).

57. *Quoting* Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 28 (2000).

58. *See, e.g.*, Andrew P. Morriss, *The Market for Legal Education & Freedom of Association: Why the "Solomon Amendment" Is Constitutional and Law Schools Aren't*

content-based speech regulation is appropriate for regulations that substantially interfere with liberty of circulation, including bar admission rules that restrict bar eligibility to graduates of ABA-accredited law schools.[59] Such scrutiny is also triggered by the constitutional protection of academic freedom.

B. *The Protection of Academic Freedom Requires Refraining from Restricting Bar Eligibility to Graduates of ABA-Accredited Law Schools*

It is well-established that free speech and association in an academic setting are protected by the First Amendment.[60] Indeed, the rhetoric used to emphasize the importance of such academic freedom in the university setting is rarely matched elsewhere. For example, in their concurrence to *Wiemen v. Updegraff*, Justices Frankfurther and Douglas wrote:

> To regard teachers—in our entire educational system, from the primary grades to the university—*as the priests of our democracy* is therefore not to indulge in hyperbole. . . . They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government. The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them *are at the basis of these limitations upon State and National power.*[61]

Expressive Associations, 14 WM. & MARY BILL RTS. J., 415, 419-23 (2005) (observing "[e]ven more astounding than the number of law schools, however, is the remarkable lack of diversity of approaches among law schools"); Lawrence C. Foster, *The Impact of the Close Relationship Between American Law Schools and the Practicing Bar*, 51 J. LEGAL EDUC. 346, 347 (2001) (observing "[t]he first-year curriculum is nearly identical at all American law schools: legal writing and research, contract law, property law, criminal law, torts, and civil procedure, with some law schools also introducing aspects of constitutional law. In the second and third year, most courses are elective").

59. *Cf. Comcast Cablevision*, 124 F. Supp. 2d at 697 (holding "this case falls within the rule of *Tornillo, Minneapolis Star and TribuneCo.*, and *Pacific Gas and Elec. Co.* and therefore strict scrutiny is required"); *see also* Dennis R. Williams & W. Thomas Fisher, *The Role of Freedom of Speech in the "Open Access" Debate*, 28 N. KY. L. REV. 796, 808 (2001) (supporting strict scrutiny applied in *Comcast Cablevision*).

60. Healy v. James, 408 U.S. 169, 180-83, 196-97 (1972). There is, however, some controversy as to whether a law school entails the sort of academic setting that is analogous to a traditional university or whether it is essentially a trade school. *See* Morriss, *supra* note 58. In light of the content of the typical law review article and the requirements typically imposed on faculty to conduct academic research and seek publication, perhaps the most accurate statement is that most law schools function *both* as an academic setting *and* as a trade school.

61. Wieman v. Updegraff, 344 U.S. 183, 196-98 (1952) (Frankfurter, Douglas, JJ.,

With similar flourish, in *Keyishian v. Board of Regents*, the Court reiterated:

> Our Nation is deeply committed to safeguarding academic freedom, *which is of transcendent value to all of us* and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection. . . . *To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.*[62]

Finally, in *Shelton v. Tucker*, the Court held "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[63]

In *Healy v. James*, these principles of law eventually led the Supreme Court to require a public university to recognize Students for a Democratic Society as an official student organization.[64] This occurred because the Court held withholding such a "stamp of approval" cast "a pall of orthodoxy over the classroom" through "subtle governmental interference" even though the university did not prohibit student members from speaking or meeting on campus.[65] It is impossible to square this holding, and the constitutional principles that led to it, with a bar admission rule that stifles online education in favor of an orthodox "bricks-and-mortar" education, especially in view of the strides that have been made in recent years by Internet technology. Stifling the freedom to engage in online education casts—and threatens to cast—a far greater "pall of orthodoxy over the classroom" than the mere failure to give a student organization an official "stamp of approval." And if academic freedom should be aggressively protected under the First Amendment from even "subtle governmental interference," then such protection should extend to the use of the Internet for educational communication and association. This conclusion is perhaps best illustrated by way of a

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concurring) (emphasis added).

62. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citations omitted) (emphasis added).

63. 364 U.S. 479, 487 (1960).

64. *Healy*, 408 U.S. at 186-89.

65. *Id.* at 196-97 (Douglas, J. concurring) (declaring "[s]tudents as well as faculty are entitled to credentials in their search for truth").

thought experiment.

It is the year 1466. Thirty years ago, Johannes Guttenberg invented the movable-type printing press. That invention is now resulting in an explosion of book publication. Libraries of knowledge that were once restricted to monasteries, nobles and a handful of universities are increasingly available to the masses. There is talk of a "Renaissance" of classical philosophy and culture. Fearing for their job security, a collection of university scholars and guild masters adopt educational standards that prohibit "book learning" in favor of face-to-face lectures and handwritten scroll-reading. A number of German and Italian principalities then decide to recognize exclusively the accreditation decisions of this collection of scholars and guild masters. Entry into various occupations is then restricted based upon whether the entrant has graduated from an accredited center of learning.

Is there any doubt that this sort of ban on "book learning" would have imposed a "straightjacket" upon Europe's intellectual development? In view of the revolutionary educational potential of Internet schooling, an admission rule that restricts bar eligibility to graduates of ABA-accredited law schools undermines academic freedom because it impedes intellectual development in the legal field. But can states be held constitutionally responsible for discriminating against online speech and association when such discrimination originates with the accreditation decisions of a private entity? The short answer is yes.

V. States that Restrict Bar Eligibility to Graduates of ABA-Accredited Law Schools are Constitutionally Responsible for the Predictable Diminishment in Protected Internet Speech and Association

The bottom line is that the "decision to recognize" an "official accreditation agency is undoubtedly state action . . . and must comply with the constitution."[66] Moreover, the exclusive recognition of *only one* accreditation agency clearly employs the state's coercive power. By extension, the state should be held constitutionally responsible for media discrimination when it restricts bar eligibility to graduates of ABA-accredited law schools. Any other conclusion would lead to constitutional absurdity.

Imagine, for example, a private accreditation organization that ordinarily would not accredit law schools that admitted African-Americans. A state that recognized such an entity as its exclusive

66. Timothy Sandefur, Note, *Dinosaur TRACS: The Approaching Conflict Between Establishment Clause Jurisprudence and College Accreditation Procedures*, 7 NEXUS J. OP. 79, 86 (2002) (relying on Med. Inst. of Minnesota v. NATTS, 817 F.2d 1310 (8th Cir. 1987)).

official accreditation agency would find itself in considerable constitutional jeopardy. This is because it is "axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." [67] Likewise, a state should be held constitutionally responsible for media discrimination when it promotes such discrimination by exclusively recognizing a private accreditation agency that ordinarily engages in media discrimination. This contention is further supported by the Supreme Court's holding in *Bates v. State Bar of Arizona*.[68]

In *Bates*, the Supreme Court struck down the Arizona State Bar's adoption of the ABA's ethical rules against lawyer advertising as violative of the First Amendment.[69] It is hard to imagine a different result would have been reached, if the Arizona State Bar had instead promulgated a rule that shifted its advertising disciplinary investigations to the ABA and then restricted bar membership in accordance with the ABA's independent disciplinary decisions based on the very same ethical rules. After all, if states cannot themselves engage in conduct that diminishes protected speech and association, they should not gain constitutional immunity by deferring to private processes that ordinarily result in the same thing. Indeed, this very point was recently made by the U.S. District Court for the Eastern District of Pennsylvania.

In *Center for Democracy & Technology v. Pappert*, the law at issue prohibited the dissemination of child pornography over the Internet and gave private ISPs independent discretion over how to restrict access to child pornography.[70] Pointing to such independence, the government mounted a state action defense, claiming it could not be held responsible under the First Amendment for how private ISPs chose to restrict access to child pornography.[71] The court rejected the government's contention

67. This constitutional axiom was repeatedly enforced in cases where local governments tried to evade 14th Amendment requirements (and sanctions for non-compliance with desegregation orders) by shifting management and control over public facilities to private organizations that would then "independently" maintain segregated facilities. Norwood v. Harrison, 413 U.S. 455, 464 (1973) (citing Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 476 (M.D. Ala. 1967) (citations omitted); *cf.* Edmunson v. Leesville Concrete Co., 500 U.S. 614, 625 (1991) (observing the rule "[i]f a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality").

68. 433 U.S. 350, 384 (1977).

69. *Id.*

70. 337 F. Supp. 2d 606, 649-51 (E.D. Pa. 2004)

71. The court in *Center for Democracy* observed that,

> [d]efendant argues that this overblocking does not violate the First Amendment because it resulted from decisions made by ISPs, not state actors. According to defendant, ISPs have 'options for disabling access that would and will not block any, or as many, sites as Plaintiffs claim were blocked in the past' and

out of hand in light of evidence that existing technology could only block both protected and unprotected speech.[72]

Like the technological limitations that had the practical effect of causing private ISPs to censor protected speech in *Pappert*, the ABA's accreditation decisions are constrained by standards that ordinarily prohibit online JD programs.[73] As in *Pappert*, the government cannot fairly disclaim constitutional responsibility for the suppression of protected speech and association by private parties when such suppression is the practical result of the government's own regulation.

Despite the foregoing arguments, states that restrict bar eligibility to graduates of ABA-accredited schools might still attempt to disclaim constitutional responsibility for media discrimination by contending that independent market mechanisms are responsible for any devaluation of (and consequent reduction in) Internet speech and association; and that bar admission rules, unlike regulations prohibiting the distribution of child pornography, do not *directly* cause the diminishment of First Amendment activities. This argument would be based on recent cases holding that the First Amendment is not offended by regulations that make certain kinds of speech unprofitable through independent market mechanisms.[74] The operative principle of this line of precedent seems to be that financial disincentives alone cannot violate the First Amendment unless they are *directly* imposed by the government by way of outright taxation or forced-escrow requirements.[75] Following this reasoning, a law that imposed a discriminatory tax on online schools and their students might entail constitutionally problematic media discrimination, but not a bar admission rule that absolutely prohibits online law school graduates entry to the bar. In other words, the state could prohibit graduates of online JD programs from earning a living and then dodge the First Amendment when the educational market predictably reacts by generating substantially less protected Internet speech and association than would otherwise be the case. Such reasoning, however, disregards

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the choice of which filtering method to use was 'completely the decision of the ISPs. . . . The Court rejects this argument.

Id. at 650-51.

72. *Id.*

73. *See supra* notes 28-40 and accompanying text.

74. Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 48 (1st Cir. 2005) (holding that in cases where financial disincentives to violate the First Amendment, "the government, not waning market demand" must be "directly responsible for the financial disincentive to speak"); Storer Cable Commc'ns v. Montgomery, 806 F. Supp. 1518, 1562 (M.D. Ala. 1992) (holding "[i]f Storer Cable loses some of the programming it desires because its program suppliers choose to leave the market rather than comply with a valid law, 'the statute results,' at most, 'in an infringement upon plaintiff's profits, not its First Amendment rights'").

75. *Wine and Spirits Retailers*, 418 F.3d at 48.

the well-established rule that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly."[76]

Generally, government action that creates financial disincentives to engage in protected speech and association implicates the First Amendment, regardless of whether they are content-based or content-neutral.[77] In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, for example, the Court rebuffed New York in its attempt to prohibit criminals from financially benefiting from the sale of books about their crimes, deeming such "Son-of-Sam" laws unconstitutional content-based regulation.[78] Content-neutral honoraria bans for public employees have met the same fate.[79] In each case, the Court held that the First Amendment was violated by regulations that created financial disincentives to engage in protected speech, and the holdings did not turn on the particular regulatory mechanism used to achieve the disincentive. There is no reason to depart from this general rule when a regulatory body uses government power to distort a market in such a way that market mechanisms produce the same financial disincentive. Permitting states to adopt regulations that dry-up market demand for online schools would create a loophole in the First Amendment.

Defenders of states that exclusively recognize ABA accreditation

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76. Rutan v. Republican Party of Illinois, 497 U.S. 62, 78 (1990); *see generally* Elrod v. Burns, 427 U.S. 347, 361 (1976) (holding "[t]he denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly"); *see also* Cappetto v. Bd. of Educ., 526 F. Supp. 710, 715-16 (N.D. Ill. 1981) (holding "a course of conduct intended to discourage and intimidate teachers from associating together" by changing job titles and work areas violated the First Amendment).

77. *See, e.g.*, Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 116 (1991); Transportation Alternatives, Inc. v. New York, 218 F. Supp. 2d 423, 442 (S.D.N.Y. 2002) (holding "section 2-10 violates the First Amendment by allowing the Parks Department to charge higher permit fees because a for-profit company is underwriting or sponsoring the event").

78. *Simon & Schuster, Inc.*, 502 U.S. at 116 (holding the Son-of-Sam law "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content . . . the statute plainly imposes a financial disincentive only on speech of a particular content") (citing Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987)); *see also* United States Satellite Broad. Co., Inc. v. Robert Lynch, 41 F. Supp. 2d 1113, 1121 (E.D. Cal. 1999) (holding "the Boxing Act tax 'singles out income derived from expressive activity for a burden the state places on no other income,' by creating 'a financial disincentive' to broadcast telecasts with a particular content . . . the Boxing Act therefore violates the First Amendment unless it passes strict scrutiny").

79. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 470 (1991) (holding "[t]he honoraria ban imposes the kind of burden that abridges speech under the First Amendment") (citations omitted).

might also advance a "state action" defense to the proposed media discrimination theory based on *Blum v. Yaretsky*.[80] There, the Supreme Court held that a state agency was not constitutionally responsible for patient transfer decisions in private nursing homes, rejecting the argument that the agency's adjustment of Medicaid benefits in response to such decisions made the state complicit in the transfer decision as a joint actor.[81] In rejecting this argument, the Court observed that the transfer decisions were based on independent professional medical judgment that was not in any way influenced by the agency or otherwise entangled with state coercive power.[82]

It might be tempting for some states to contend that charging them with media discrimination under the proposed theory is no different than the failed attempt in *Blum* to hold a state agency responsible for nursing home transfer decisions. They would likely argue that an ABA accreditation restriction does not adopt the ABA's anti-online schooling accreditation standards, but only responds to the ABA's independent professional judgment in making accreditation decisions. This argument, however, would disregard the Supreme Court's pointed observation in *Blum* that only the nursing home's transfer procedures and decisions were being challenged, and *not* the *agency's* benefit adjustment procedures or decisions.[83] By contrast, the proposed theory of media discrimination challenges only the *bar admission rule* that recognizes the ABA as the state's *exclusive* accreditation agency, it does not challenge the ABA's underlying accreditation standards or decisions. This is not just clever posturing of the proposed media discrimination theory; unlike the challenge mounted in *Blum*, the proposed theory cannot be said even to *originate* with the ABA's private action in a relevant sense.

In the sense of identifying the source of the alleged constitutional injury, the Supreme Court observed that the theory in *Blum* originated with independent private action and not state action.[84] This is because the private patient transfer decisions in *Blum* would have caused the

80. 457 U.S. 991 (1982).
81. *Id.* at 1006-07
82. *Id.* at 1007-09.
83. *Id.* at 1005. The Court observed that,

> [r]espondents, however, do not challenge the adjustment of benefits, but the discharge or transfer of patients to lower levels of care without adequate notice or hearings. That the State responds to such actions by adjusting benefits does not render it *responsible* for those actions. The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care.

Id. (emphasis added).
84. *Id.* at 1003.

complained-of injury (i.e., inappropriate transfer to a lower standard of care) regardless of state action. By contrast, under the proposed media discrimination theory, there would be no cognizable constitutional "injury" *without* state action. After all, the proposed media discrimination theory arises from the contention that *restricting bar eligibility* to graduates of ABA-accredited schools diminishes Internet speech and association. If the ABA were *not* established by law as the *exclusive* accreditation agency for a given jurisdiction, its preferences regarding online schooling would have no *necessary* effect on demand for Internet communication and association—the impact of the ABA's preferences would be left entirely to the decisions of individuals in the educational market, which cannot be predicted, much less ascribed to state action. In other words, the ABA's discriminatory approach to Internet schooling, standing alone, is not the basis of the proposed media discrimination theory. Only the *governmental* decision to recognize the ABA as a state's *exclusive* law school accreditation agency *necessarily* reduces the usefulness of online schooling, which *necessarily* suppresses market demand for online schooling, which, in turn, *necessarily* devalues and diminishes Internet communication and association from what would otherwise be the case. In short, although the decision to discriminate against the Internet originates with the ABA's private action, the *injury* underpinning the proposed media discrimination theory originates with state action—unlike the theory rejected in *Blum*.

In sum, an admission rule that restricts bar eligibility to graduates of ABA-accredited schools discriminates against the Internet medium, devalues online educational communication, reduces the amount of protected speech and association, and, thereby, interferes with the liberty of circulation and academic freedom protected by the First Amendment—predictably reinforcing what scholars have described as uniformity in academic content.[85]

85. *See supra* note 58.

VI. An Admission Rule that Absolutely Refuses Graduates of Online J.D. Programs from Sitting for the State Bars Should Invoke and Fail Heightened Judicial Scrutiny under the First Amendment

The Ninth Circuit Court of Appeals' analysis in the recent case of *Mothershed v. Arizona* suggests how courts should review bar admission rules that prohibit graduates of online law schools from practicing law. [86] There, the Court of Appeals applied intermediate scrutiny under the First Amendment to bar admission rules establishing *pro hac vice* and general admission qualifications for licensure in the State of Arizona.[87] It did so based on the constitutional claims advanced by a resident attorney who was licensed by an out-of-state jurisdiction.[88] The attorney invoked overbreadth standing to advance the claim that Arizona's bar admission rules interfered with and chilled the First Amendment right of Arizonans to consult with an out-of-state attorney.[89] Although the Court of Appeals sustained the constitutionality of the challenged admission rules as being content neutral and narrowly tailored,[90] it is significant that the court applied intermediate scrutiny to what are commonly regarded as occupational regulations of the legal profession. In doing so, *Mothershed* consciously followed established precedent that has repeatedly upheld the right to hire and communicate with legal counsel as falling under the free speech and association protections of the First Amendment.[91] Other courts have similarly applied heightened First

86. 410 F.3d 602, 610-12 (9th Cir. 2005).
87. *Id.* at 612.
88. *Id.*
89. *Id.*
90. *Id.* at 611-12.
91. *Id.* at 610-12 (citing Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 7-8 (1964) (striking down ethical rule charging union with unauthorized practice of law by engaging in policy of advising members to use specific attorneys, holding "*[a] State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest*") (emphasis added); United Mine Workers of Am. v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967)). In holding unconstitutional the declaration that the union was engaging in the unauthorized practice of law by employing a salaried lawyer, the Court in *United Mine Workers* stated that,

> *[t]he First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such.* We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.

389 U.S. at 222 (emphasis added); *see* Denius v. Dunlap, 209 F.3d 944, 953 (7th Cir. 2000); DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990) (holding "[t]he right to

Amendment scrutiny to other regulations that would otherwise seem to be occupational in nature.[92]

Nevertheless, despite a respectable pedigree, *Mothershed*'s application of First Amendment scrutiny to an occupational regulation might appear to clash with the principles articulated by the Supreme Court in *Lowe v. S.E.C.*[93] There, citing a number of earlier cases, Justice White seemingly observed in his concurrence that the First Amendment is not implicated by generally applicable occupational regulations governing "the personal nexus between professional and client," such as between attorney and client.[94] But the Supreme Court's prior and subsequent holdings, and indeed Justice White's own views, are considerably more nuanced.

Justice White acknowledged in *Lowe*, for example, that

> [w]here the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such.[95]

Bar admission rules, unlike ethical rules, fall into this category in so far as they typically restrict access to the legal profession long before client contact is made. Moreover, even Justice White conceded that in the case of occupational regulations aimed at personal dealings between professionals and clients, "it is possible that conditions the government might impose on entry into a profession would in some cases themselves violate the First Amendment."[96] Again, this analysis indicates that even if *all* bar admission rules do not implicate the First Amendment, *some* might. In fact, as will be discussed below, the justification for applying heightened scrutiny to bar admission rules is reinforced by Supreme Court precedent holding that the First Amendment is implicated by occupational regulations that impede too much protected speech and association.

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retain and consult an attorney . . . implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech").

92. *See, e.g.*, Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992) (applying First Amendment analysis to licensure of psychologists); Walker v. Flitton, 364 F. Supp. 2d 503 (M.D. Pa. 2005) (applying First Amendment analysis to law prohibiting unlicensed individuals from being involved in the sale of preneed funeral services).

93. *See* 472 U.S. 181, 232 (1985) (White, J., concurring).

94. *Id.*

95. *Id.*

96. *Id.*

A. Mothershed*'s Analysis Makes Sense Because Bar Admission Rules Can Impede too Much Protected Speech and Association to be Immune from First Amendment Scrutiny*

To determine whether occupational regulations with large impacts on expressive and associational activities should be subject to heightened scrutiny under the First Amendment, the U.S. Supreme Court has used what amounts to a balancing test. In *Thomas v. Collins*, for example, the U.S. Supreme Court utilized First Amendment heightened scrutiny to strike down a registration/disclosure requirement for union organizers.[97] Rejecting the government's assertion that the requirement did not implicate the First Amendment because it was only incidental to a comprehensive economic regulatory regime for organized labor, the Court said:

> The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one "engaged in business activities" or that the individual who leads it in exercising these rights receives compensation for doing so. Nor, on the other hand, is the answer given, whether what is done is an exercise of those rights and the restriction a forbidden impairment, by ignoring the organization's economic function, because those interests of workingmen are involved or because they have the general liberties of the citizen, as appellant would do. These comparisons are at once too simple, too general, and too inaccurate to be determinative. Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence.[98]

In essence, the Court engaged in a weighing of speech impacts versus non-speech regulatory purposes in determining whether or not to characterize an occupational regulation as implicating the First Amendment.

Similarly, in *Riley v. National Federation of the Blind*, the Supreme Court struck down licensure, contracting restrictions and disclosure requirements for professional charitable solicitors—repeatedly rejecting the argument that comprehensive non-speech, anti-fraud regulatory purposes were sufficient to render the speech impact of such regimes

97. Thomas v. Collins, 323 U.S. 516, 519, 534-35, 538, 542-43 (1945).
98. *Id.*

immaterial under the First Amendment.[99] The Court emphasized the regulation of professional charitable solicitors should be analyzed under the First Amendment because of its effect in substantially reducing "the quantity of expression," further stating "[w]hether one views this as a restriction of the charities' ability to speak, or a restriction of the professional fundraisers' ability to speak, the restriction is undoubtedly one on speech, and cannot be countenanced here."[100]

Taken together, prior to *Mothershed*, the Supreme Court had repeatedly held that occupational regulations implicate heightened scrutiny under the First Amendment where the weight of speech and associational impacts swamp the weight of the regulatory regime's non-speech regulatory purposes.[101] Although "liberty of circulation" doctrine was not articulated in *Thomas* or *Riley*, the goal of ensuring structural protections exist for the free circulation of ideas logically connects their holdings to the core of the First Amendment.[102]

There is a natural progression under the First Amendment from *Thomas* and *Riley* to *Mothershed*. The regulations in both *Thomas* and *Riley* can be seen as directly analogous to the bar admission rules in *Mothershed*. After all, non-compliance with any of these regulatory regimes effectively precluded work in a speech-oriented profession, which, in turn, precluded speech and association both by the affected professional and by those the professional would otherwise represent—such as potential union members, charities and clients. In short, the regulatory regime addressed in each case imposed what was a

99. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 784-87, 791 (1988); *see also* Maryland Sect. of Md. v. Joseph H. Munson Co., 467 U.S. 947, 954-55, 968-69 (1984) (holding "[w]hether the charity is prevented from engaging in First Amendment activity by the lack of a solicitation permit *or by the knowledge that* its *fundraising activity is illegal if it cannot satisfy the percentage limitation, the chill on the protected activity is the same*") (emphasis added); Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632, 636, 639 (1980) (observing "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues . . . without solicitation the flow of such information and advocacy would likely cease"); Bellotti v. Telco Commc'ns, Inc., 650 F. Supp. 149, 151-53 (D. Mass. 1986) (observing "[t]he issue before the Court is whether . . . a non-waivable percentage limitation on the compensation of professional solicitors, is an allowable economic regulation of the solicitor, or whether it impermissibly intrudes on the free speech rights of charitable organizations" and holding the limitation violated free speech rights).

100. *Id.*

101. With respect to regulatory regimes involving legally mandatory marketing schemes, both the majority and the dissenters have advocated a similar type of analysis that asks if the regime's impact on protected speech and associational interests can be fairly seen as "germane" or "incidental" to a "comprehensive" non-speech regulatory purpose. *Compare* United States v. United Foods, Inc., 533 U.S. 405, 415-16, 420-21 (2001) *with* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 477 (1997).

102. *See supra* notes 48-59 and accompanying text.

commensurate restraint on protected speech and associational relationships. Moreover, although the regulatory regimes in *Thomas* and *Riley* were justified as being incidental to other "comprehensive" non-speech regulatory purposes, including the prevention of fraud, these justifications were rejected by the Supreme Court.[103] It is hard to imagine the non-speech regulatory purposes for the bar admission rules in *Mothershed* are more weighty or central then those that were unable to save the regulatory regimes in *Thomas* and *Riley* from First Amendment scrutiny.

In fact, *Mothershed* advances a more modest application of First Amendment principles to a putative non-speech regulatory regime than what could have been supported by a logical extension of *Riley*. In *Riley*, the Court's First Amendment analysis considered the speech impacts of the challenged regulations on both professional charitable solicitors and the charities themselves—declaring, in effect, it did not matter whose speech was impacted, all that mattered was that speech was being restricted.[104] In this respect, *Riley* would seem to provide support for the contention that attorneys have a *personal* claim under the First Amendment when regulations significantly hamper their ability to speak for others. After all, the speech-activities of professional charitable fundraisers are very similar to those of attorneys in that both typically are paid a fee for speaking on behalf of another, rather than advancing their own personal viewpoints. *Riley* also applied strict scrutiny.[105] *Mothershed*, however, did not go that far; it only analyzed the First Amendment rights of clients in the context of an attorney advancing a *client's* constitutional claim based on overbreadth standing—and it only applied intermediate scrutiny.[106] From this vantage point, the Ninth Circuit Court of Appeals was quite restrained in its constitutional analysis and sensitive to the unique concerns addressed by the regulation of the legal profession.

Furthermore, *Mothershed* does not stand for the proposition that all bar admission rules necessarily trigger First Amendment scrutiny. The title "Officer of the Court" was not disregarded by the Court of Appeals as a mere platitude. The Court was cognizant that the conduct of the legal profession is central to the governmental administration of justice and warrants special regulatory consideration.[107] Indeed, the practice of law *is* significantly different from other occupations in that attorneys regularly wield the coercive power of the State directly or indirectly

103. *Riley*, 487 U.S. at 795; *see* Thomas v. Collins, 323 U.S. 516, 531 (1945).
104. *Riley*, 487 U.S. at 794-95.
105. *Id.*
106. Mothershed v. Arizona, 410 F.3d 602, 610-12 (9th Cir. 2005).
107. *Id.* at 611-12

through the initiation of lawsuits, the service of subpoenas, and threats of legal action. Correspondingly, there are undoubtedly weighty non-speech regulatory purposes behind some bar admission rules, against which any speech impact might reasonably be viewed as incidental and unprotected by the First Amendment. Even so, the Ninth Circuit Court of Appeals was well-within the scope of the principles laid down in *Thomas* and *Riley* when it applied intermediate scrutiny under the First Amendment to bar admission rules that prohibited residents of Arizona from consulting with attorneys who happen to be licensed by other jurisdictions. The argument for such heightened scrutiny is at least as persuasive in the context of admission rules that enforce media discrimination.

B. Mothershed*'s Analysis Warrants Applying First Amendment Scrutiny to Admission Rules that Absolutely Restrict Bar Eligibility to Graduates of ABA-Accredited Law Schools*

The "speech impact" of an admission rule that absolutely restricts bar eligibility to graduates of ABA-accredited law schools is much broader than that of the bar admission rules in *Mothershed.* Such a rule is not only a restraint on consultative relationships (as in *Mothershed*), it devalues and diminishes educational Internet speech and association by law schools, their professors and students for no other reason than that it occurs online.[108] In view of the growing body of evidence that online schooling meets or exceeds the educational outcomes of "bricks and mortar" schooling,[109] it is becoming increasingly apparent that this distinct and discriminatory speech impact lacks any significant countervailing non-speech regulatory purpose. Even more significantly, where a given regulation poses a risk of media discrimination, the Supreme Court has already observed that "laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny."[110] Consequently, there is even greater reason to apply heightened First Amendment scrutiny to an admission rule that restricts bar eligibility to graduates of ABA-accredited law schools than to the admission rules at issue in *Mothershed.* Moreover, the absolutism of recognizing the ABA as the *exclusive* accreditation agency of the state tips the balance in favor of deeming such a rule unconstitutional under intermediate scrutiny, unlike

108. *See supra* notes 28-40 and accompanying text.

109. *See supra* note 21 and accompanying text.

110. Turner Broad. Sys., Inc. v. F.E.C., 512 U.S. 622, 640-41 (1994) (citing Arkansas Writer's Project v. Ragland (1987)).

the rules that were upheld in *Mothershed.*

C. *The Absolutism of Establishing the ABA as the Exclusive Accreditation Agency of the State Warrants Deeming Such an Admission Rule Unconstitutional Even under Intermediate Scrutiny*

The bar admission rules upheld in *Mothershed* were deemed sufficiently narrowly tailored to withstand intermediate scrutiny because they advanced a legitimate state interest without significantly impacting speech and association unrelated to this purpose.[111] To support this holding, the Court observed, in part, that the rules did not impose "a blanket prohibition on the appearance of out-of-state attorneys in Arizona courts."[112] The same sort of observation cannot be made about a bar admission rule that *absolutely* restricts bar eligibility to graduates of ABA-accredited law schools.

Even if aimed at the legitimate state interest of avoiding the expense of individually evaluating the quality of every law school and the competency of every graduate,[113] an *absolute* restriction on bar eligibility to graduates of ABA-accredited schools has significant speech impacts that are completely unrelated to this purpose. Not only does the rule restrict the consultative freedom of potential clients of both competent and incompetent law school graduates, it devalues and diminishes educational Internet speech and association for no other reason that it occurs online.[114] The sweep of such an admission rule is so broad that it can only be seen as a prophylactic speech regulation that would fail even intermediate scrutiny under the First Amendment.[115]

In the final analysis, the real choice is not between evaluating the quality of every law school and the competency of every graduate, or only evaluating the competency of graduates of ABA-accredited law schools; the real choice is between an absolutist prophylactic admission rule or an admission rule that establishes ABA-accreditation as a recognized signal of competency, but also allows for the possibility of waiver for graduates of online JD degree programs in light of the ABA's unfounded discrimination against Internet schooling. Even under intermediate scrutiny, states that continue to restrict bar eligibility to

111. *Mothershed*, 410 F.3d at 611-12.

112. *Id.* at 612.

113. *Cf.* Appeal of Murphy, 393 A.2d 369 (Pa. 1978), *cert. denied*, 440 U.S. 901 (1978) (holding investigating the legal education of every applicant would be "very impractical").

114. *See supra* notes 28-40 and accompanying text.

115. *See* Edenfield v. Fane, 507 U.S. 761, 777 (1993) (applying the proposition "[b]road prophylactic rules in the area of free expression are suspect" in the context of intermediate scrutiny).

graduates of ABA-accredited law schools, without furnishing a waiver process for graduates of online JD programs, should anticipate constitutional litigation under the First Amendment, especially as recognition of the educational value of the Internet continues to grow.

VII. Conclusion

States that restrict bar eligibility to graduates of ABA-accredited law schools not only punish graduates of online JD programs for daring to have engaged in online educational communication, they necessarily devalue educational communication and association over the Internet. This, in turn, predictably diminishes the amount of protected Internet speech and association in favor of traditional face-to-face communication and association.

Such media discrimination is vulnerable to First Amendment attack under theories that seek to protect liberty of circulation, academic freedom and access to the legal profession—the lifeblood of which is protected speech and association. Moreover, because of overbreadth standing under the First Amendment, each of these theories can be brought by any aggrieved graduate, student, law school or potential client.[116]

In light of the foregoing, the ABA should be encouraged to continue working towards developing accreditation standards that measure and certify academic quality without sacrificing innovation to educational orthodoxy. But states must not wait for the ABA's standards to evolve; they should meet their constitutional obligations and furnish graduates of online JD programs with an alternative pathway to licensure in the form of a waiver process that takes into account objective demonstrations of competency, such as legal experience and licensure by other state bars.[117]

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116. *See* Sect. of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956, 958 (1984) (holding a plaintiff's ability to invoke "overbreadth standing . . . has nothing to do with whether or not [his] own First Amendment rights are at stake" but instead depends upon whether the plaintiff "satisfies the requirement of 'injury-in-fact,' and whether [he] can be expected satisfactorily to frame the issues in the case"); *Mothershed*, 410 F.3d at 610-12.

117. *Cf.* Michael Ariens, *Law School Branding And The Future Of Legal Education*, 34 ST. MARY'S L. J. 301, 360-61 (2003), observing,

> [t]he mantra, "the only constant is change," a refrain heard in most discussions concerning the future of the legal profession, has long been absent from discussions of the future of legal education. This day of reckoning can be postponed for some time, perhaps as long as a decade. The ability of law school graduates to repay the debt incurred in obtaining a law degree remains difficult but manageable, and so long as interest rates remain low and the market for lawyers remains sound, law schools can avoid change. But the difference between Concord University School of Law tuition and average private law school tuition continues to grow. The current absence of more than

In this way, the door to a profession that is infused with the exercise of First Amendment rights will open to individuals for whom the Internet is simply the best—and perhaps the only—educational medium. Equally important, ordinary citizens will be able to enjoy their First Amendment rights more effectively because they will have greater access to qualified legal counsel.

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one entrepreneur in the legal education market is not likely to last. . . . The longer the wait, however, the greater the danger that change will be imposed from without.

Id.

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